

# In the Court of Appeals of the State of Alaska

**Scott Wayne Gardner,**  
Appellant,

v.

**State of Alaska,**  
Appellee.

Court of Appeals No. **A-13751**

## **Order**

Date of Order: **12/21/2020**

Trial Court Case No. **3PA-16-01567CR**

Before: Allard, Chief Judge, and Wollenberg and Harbison, Judges.

Following a bench trial, Scott Wayne Gardner was convicted of first-degree assault and making a false report. Gardner appealed his convictions. Before briefing began, the parties filed a joint motion for summary disposition, asserting that the trial court had failed to conduct an inquiry into whether Gardner knowingly, intelligently, and voluntarily waived his constitutional right to a jury trial and that Gardner was therefore entitled to a new trial. We agreed with the parties and reversed Gardner’s convictions.<sup>1</sup>

Following our decision reversing Gardner’s convictions, Gardner’s case returned to pretrial status. Because he is now in pretrial status, Gardner is constitutionally entitled to have reasonable bail conditions set under Article I, Section 11 of the Alaska Constitution.<sup>2</sup>

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<sup>1</sup> See *Gardner v. State*, A-13261, Summary Disposition No. 0140, at \*2 (Alaska App. Aug. 5, 2020) (unpublished).

<sup>2</sup> Article I, Section 11 of the Alaska Constitution entitles criminal defendants “to be released on bail, except for capital offenses when the proof is evident or the presumption great[.]”

Gardner filed a request for a bail hearing, along with a bail proposal that included electronic monitoring with residence and employment in Anchorage, alcohol monitoring, and a \$1,500 cash performance bond. The State opposed Gardner’s release plan.

Following the hearing, the superior court rejected Gardner’s proposal, but it did not otherwise set bail. Gardner therefore remains under a no-bail order.

Gardner now appeals, arguing that the court erred in declining to set any bail. We agree. As we said in *Hamburg v. State*, “Article I, Section 11 . . . (in conjunction with section 12, the provision that prohibits excessive bail) guarantees that the court must set reasonable conditions of bail release for a defendant who has not yet been convicted.”<sup>3</sup> Because Gardner’s convictions have been vacated, and his case has returned to pretrial status with charges pending, he is entitled to have reasonable conditions of bail release set.

The State acknowledges that Gardner is entitled to bail in this case while awaiting retrial. But the State also notes that Gardner was on probation in two prior felony cases at the time of the underlying events in this case and that, after Gardner was initially convicted in this case, the trial court imposed his remaining suspended time in these two prior cases. Gardner did not appeal his probation revocation or disposition and was therefore required to serve this time. The State argues that because the current

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<sup>3</sup> *Hamburg v. State*, 434 P.3d 1165, 1165 (Alaska App. 2018) (citing *Martin v. State*, 517 P.2d 1389, 1393-95 (Alaska 1974)); *see also Torgerson v. State*, 444 P.3d 235, 237 (Alaska App. 2019) (“While the Alaska Supreme Court has declared that a criminal defendant is not necessarily entitled to bail in an amount the defendant can post, a judge may not set bail in an amount that goes beyond that which is necessary to fulfill the purposes of bail — *i.e.*, to reasonably assure the defendant’s appearance and the safety of the alleged victim, other persons, and the community.”).

record does not establish whether Gardner has fully served the sentence on his petitions to revoke probation, we should remand for clarification of the record — i.e., a determination of whether Gardner is time-served on his probation sentence — and if he has completed that sentence, to set bail in this case in light of the law applicable to pretrial bail.

But Gardner is entitled to a pretrial bail order in this case, regardless of whether he is still serving time in other cases.<sup>4</sup> Accordingly, we **VACATE** the trial court’s no-bail order and **REMAND** this case for a bail hearing and consideration of an appropriate bail order under the standards applicable to pretrial bail release. After considering the positions of the parties, including any bail proposals by Gardner, the court “shall impose the least restrictive condition or conditions that will reasonably assure [Gardner’s] appearance and protect the victim, other persons, and the community.”<sup>5</sup>

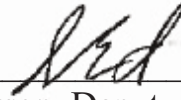
Entered at the direction of the Court.

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<sup>4</sup> Alaska Const. art. I, § 11. As a practical matter, the Department of Corrections will not release Gardner if he has been remanded to serve a sentence in another case and has not yet finished serving that time.

<sup>5</sup> Former AS 12.30.011(b) (2016); *Torgerson*, 444 P.3d at 237. Gardner’s case is governed by the bail statutes in effect in 2016, when the charged offense in this case occurred. See *Pisano v. State*, Court of Appeals File No. A-13089 (Order dated May 24, 2018), at 3, 10.

Clerk of the Appellate Courts



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